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**No NTG-0216**

## SUPPLEMENTARY STATEMENT OF MS LOUISE MACLEOD

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| Name | Louise Macleod |
| Address | One Canberra Avenue, Canberra ACT |
| Occupation | Public Servant |
| Date | 23 February 2023 |

### Introduction

1. This statement made by me accurately sets out the evidence that I am prepared to give to the Royal Commission into the Robodebt Scheme (**Royal Commission**).

2. This supplementary statement is true and correct to the best of my knowledge and belief.

3. I provide this supplementary statement in response to the Notice to Give a Statement and Produce Documents dated 20 February 2023 and numbered NTG-0216 (**Supplementary Notice**). It is a supplementary statement in that it is additional to the written statement I give in response to the Notice to Give a Statement and Produce Documents dated 15 February 2023 and numbered NTG-0006 (**First Notice**).

4. The current Commonwealth Ombudsman, Mr Iain Anderson, delegated authority to me under section 34 of the *Ombudsman Act 1976* (Cth) (**Act**) to disclose information to the Royal Commission to assist its inquiries. I make this statement based on matters within my own knowledge and the records made available to me under instrument of delegation by the Commonwealth Ombudsman.

5. This information is produced to the Royal Commission on the basis that it will be received into evidence by the Royal Commission pursuant to the Supplementary Notice and on the basis the information will be treated as evidence which is subject to section 6DD of the *Royal Commissions Act 1902* (Cth).

**Question 1**

**Outline the extent of your involvement in the 2019 and 2021 Reports**

### 2021 Report

6. I was not involved in the preparation of the report published by the Commonwealth Ombudsman in April 2021, entitled *'Services Australia's Income Compliance Program: A Report About*

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*Services Australia's Implementation of Changes to the Program in 2019 and 2020*'. I cannot comment on the details of the 2021 Report.

7. On 9 June 2017, I commenced as the Senior Assistant Ombudsman, Complaints Management and Education Branch. This position was not involved in the investigation or preparation of the 2021 Report.

8. I have previously provided a written statement in response to the First Notice in relation to my positions held at the Office of the Commonwealth Ombudsman (**Office**).

**2019 Report**

9. I provide the following information to demonstrate my involvement in the preparation of the report published by the Commonwealth Ombudsman in April 2019, entitled '*Centrelink's Automated Debt Raising and Recovery System: Implementation Report*'.

10. The purpose of the 2019 Report was to monitor the implementation of the recommendations made in the report published by the Commonwealth Ombudsman in April 2017, entitled '*Centrelink's Automated Debt Raising and Recovery System: A Report About the Department of Human Services' Online Compliance Intervention System for Debt Raising and Recovery*' (**2017 Report**).

11. As noted above at paragraph [7], I commenced a new position with the Office on 9 June 2017. My primarily responsibilities were overseeing the complaint handling and complaints education functions for the Office. The Complaints Management and Education Branch (**Branch**) assessed and investigated complaints (generally made by the public) on a case-by-case basis. The Branch also delivered education on best practice in complaint handling to government agencies. This role differed to the role I had previously held, which was as acting Senior Assistant Ombudsman, Social Services, Indigenous and Disability Branch. That branch became known as the Strategy Branch following an Office restructure by the Ombudsman, Mr Michael Manthorpe.

12. Ms Fiona Sawyers, Senior Assistant Ombudsman, joined the Office and assumed responsibility for the new Strategy Branch. The Strategy Branch was responsible for conducting own motion investigations under section 5(1)(b) of the Act into systemic issues arising from administrative actions, and strategic engagement with Commonwealth agencies across the social services portfolio, including the Department of Human Services (**DHS**) and the Department of Social Services (**DSS**). My Branch and Ms Sawyers' branch worked closely together as the individual complaints that were investigated by my Branch would then be analysed by Ms Sawyers' branch to identify systemic issues that needed strategic engagement by her branch with the agencies involved. There was no overlap in responsibilities between Ms Sawyers' role and my own.

13. I was not responsible for monitoring the recommendations made in the 2017 Report. Nor was I actively involved in the investigation and preparation of subsequent reports on the Robodebt scheme published by the Commonwealth Ombudsman. These own motion investigations were undertaken by the Strategy Branch.

14. The Strategy Branch and Ms Sawyers were responsible for monitoring the implementation of the recommendations made in the 2017 Report.

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15. On 9 April 2018, I was copied into internal email correspondence between Ms Sawyers and the relevant team members tasked with investigating and preparing the 2019 Report.[1] In that email, Ms Sawyers advised the investigations team that I had met with Mr Manthorpe to discuss the response from DHS to a media inquiry conducted by the Guardian Australia. This media inquiry related to the outcome of the 2017 Report. I have no recollection of this meeting and no longer have file notes of this meeting.

16. The DHS's response to the Guardian stated that

> *The [DHS] fully cooperated with the Commonwealth Ombudsman's investigation which found the online compliance system meets all legislative requirements ...*
>
> *As previously stated, the [DHS] strongly refutes any claims that it has conducted its compliance activities in a manner which is inconsistent with the legislation.*

17. The records show I was copied into this correspondence because it related to the 2017 Report and the Ombudsman, Deputy Ombudsman and Ms Sawyers were aware I had been involved in the own motion investigation that led to the 2017 Report.

18. In the email on 9 April 2018, Ms Sawyers noted that Mr Manthorpe requested further investigation into a research article prepared by Professor Emeritus Terry Carney AO and the legal advices from DHS. It was further suggested that Mr Manthorpe wanted to discuss the legality of the online compliance system (**OCI**) in the near future. Ms Sawyers drew attention to a draft chapter of the 2017 Report addressing the legality of the OCI, which was not included in that report. A copy of this draft chapter is attached to this statement.[2] Lastly, Ms Sawyers queried with the team whether Mr Manthorpe should write to DHS to correct the record concerning its response above at paragraph [16]. I cannot recall if further discussion occurred between Mr Manthorpe and the investigations team and if I was part of that discussion. I no longer have file notes to indicate that I was involved.

19. On 13 April 2018, I was copied into an internal email from Ms Sawyers to the Deputy Ombudsman, Jaala Hinchcliffe, providing information about the legality of the OCI. This information included the legal advices provided by DHS and DSS to the Ombudsman in preparation of the 2017 Report. This email also included an internal analysis of the issues raised by Professor Carney in the article entitled '*The New Digital Future for Welfare: Debts Without Legal Proofs or Moral Authority?*' (2018) (**Carney article**).[3]

20. On 19 April 2018, I was copied into internal email correspondence between Mr Manthorpe, Ms Hinchcliffe and Ms Sawyers about the OCI.[4] In that email, Mr Manthorpe noted that he had received and reviewed the various legal advices and deliberations of the OCI by the DHS and the DSS. He expressed preliminary views about the legality of the OCI, noting that it would be useful to accept the DHS' offer to provide a briefing on the DHS' views on the lawfulness of the OCI (as it was then), including how the issue had developed in the Administrative Appeals Tribunal and the courts.

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[1] A2312044.
[2] A461854.
[3] A1909596.
[4] A1909769.

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21. In response to this email, Ms Hinchcliffe organised the briefing proposed by DHS, which occurred on 17 May 2018. The lawfulness of income averaging was discussed at this meeting. Ms Hinchcliffe records that the attendees at this briefing agreed that the use of averaging could lead to debts being raised that were more than the debts owed.[5]

22. On 18 May 2018, Ms Annette Musolino, Chief Counsel of the Legal Services Division, DHS, sent an email to Ms Hinchcliffe, providing a summary of the key points from the briefing on 17 May 2018 and the DHS' position on the Carney article.[6] Ms Hinchcliffe forwarded this email correspondence to the Ombudsman, other staff members and me. In this email, Ms Musolino disagreed with Professor Carney's analysis on the lawfulness of income averaging. She noted that the Carney article:

    a) misunderstood many aspects of the OCI process and the safeguards in place to afford procedural fairness to social welfare beneficiaries;

    b) confused and conflated evidential burdens of proof which apply to the making of administrative decisions; and

    c) falsely asserted that DHS had specific legal obligations and evidence burdens for raising debts.

23. On 24 May 2018, Ms Hinchcliffe responded to Ms Musolino's position in respect of the lawfulness of income averaging and the Carney article.[7] I was copied into this correspondence. I note the following information to outline the issues raised by Ms Hinchcliffe to Ms Musolino.

    a) whether in DHS' view it would be ultra vires the powers under section 1223 of the *Social Security Act 1991* (Cth) to use income averaging to raise debts that exceed the amount of debt owed by the customer. Ms Hinchcliffe further inquired whether the DHS had sought external legal advice on this issue.

    b) whether there could be situations in which DHS considered it had a duty to inquire when raising debts.

    c) whether the DHS has acted on the recommendations in paragraph 3.6 of the 2017 Report.[8]

24. Ms Hinchcliffe also drew Ms Musolino's attention to the following matters:

    a) The statement by Mr Hank Jongen from DHS to Fairfax Media on 5 April 2018, which proclaimed "the independent review by the Commonwealth Ombudsman found the OCI system met all legislative requirements and accurately calculated debts when the required information was entered", did not reflect the findings at paragraph 3.3 of the 2017 report.

    b) While the 2017 Report did not address the legality of income averaging, it still expressed concerns about averaging at paragraphs 3.2 and 3.3. The Office was satisfied that if the

[5] A1909602
[6] A1909593.
[7] A1909602.
[8] A1909602.

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customer was able to collect the income information required and enter it properly into the system, the OCI was capable of accurately calculating the debt.

c) At paragraph 3.6, the 2017 Report suggested DHS test a sizable sample of debts raised by the OCI and re-evaluate where the risk for debts calculated on incomplete information should properly lie and investigate ways to mitigate the risk of over-recovering debts.

25. On 8 June 2018, Ms Musolino responded to Ms Hinchcliffe's email.[9] I was copied into this email. Ms Musolino expressed the view that:

> *... the procedural fairness available throughout the OCI process, including merits review, provide ample opportunity for the correct decision to be made. The practice of averaging is reasonable, noting that it is generally used in circumstances where recipients refuse to engage with the department or fail to adequately explain discrepancies which have been identified. Further any decision based on averaging can always be changed if new information comes to light.*

Ms Musolino confirmed that DHS would ensure that the media response was consistent with the wording used in the 2017 Report.

26. On 3 October 2018, a staff member of the investigations team sent an email to the Director of the Legal team in the Office, Kate Wandmaker.[10] This email contains an early draft of the proposed legal section for the 2019 Report, requesting legal advice from Ms Wandmaker on the draft. I was copied into this email.

27. On 3 October 2018, I was then consulted by a staff member of the Strategy Branch on a minute seeking approval from Mr Manthorpe to draft the 2019 Report.[11]. I made minor editorial amendments to the covering minute to correct typographical errors. I also indicated that I supported the recommendation made in the minute.

28. I provide the following information contained in the minute:

a) The Office had been investigating the implementation actions of DHS and DSS since September 2017. The investigations team was satisfied that most of the recommendations had been implemented, attaching analysis against each recommendation.

b) It was recommended that a section on legality of income averaging be included in the 2019 Report, noting the public criticism of the 2017 Report. It was noted that the question of legality could not be decided with certainty by the Office. Rather, the Office would be guided by legislative amendment to clarify the lawfulness of income averaging or a decision of the Federal Court in a fully argued case.

c) The 2019 Report would focus on the administration of the program and recommendations to improve its fairness, transparency, and effectiveness.

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[9] A2312058.
[10] A1909788.
[11] A1909573, A1679774, zA24867, zA24960, zA247715, zA24879.

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29. The Ombudsman approved the minute on 8 October 2018.[12]

30. On 8 October 2018, I sent an email to the investigation officer and the Director of the Legal team. I advised that I had a discussion with Mr Manthorpe and the Acting Senior Assistant Ombudsman, Strategy Branch, Lee Katauskas about drafting the 2019 Report, which Mr Manthorpe had approved.[13] I also conveyed Mr Manthorpe's request for changes to the legality section of the 2019 Report, which were:

> *to avoid the legal argument and have the report do as follows - acknowledge and summarise the concerns raised by various stakeholders about legality (for example Carney, Hanks, the National Welfare Rights network etc); summarise the legal position of DHS/DSS; conclude the issue of legality cannot be resolved by the Office; and suggest/recommend the department obtain external legal advice and run a test case or obtain legislative amendment.*

31. On 5 February 2019, I was sent an email from Ms Sawyers, attaching a draft of the 2019 Report.[14] I was informed that the draft report had been considered by the new Strategic Policy Board, comprising the Ombudsman, Deputy Ombudsman and Senior Assistant Ombudsmen while I was on personal leave. I was further informed that the report needed to be cleared by the Ombudsman and the Deputy Ombudsman, before being sent to the Secretary of DHS, Renee Leon for comment under section 8(5) of the Act.

32. On 4 and 6 February 2019, I was included in an internal email exchange between the Ombudsman and Ms Sawyers about the nature of the complaints received by the Office about the Employment Income Confirmation system – the new name DHS gave to the OCI. This email correspondence discussed how the Office was handling the complaints and whether any new issues were being raised. This email further considered the possibility of including the draft chapter on legality in the 2019 Report, with edits from the Ombudsman.[15]

33. I am not aware of the reasons why the draft text about legality was not ultimately included in the 2019 Report.

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| Signature of witness: | LMacleod |
| Name of witness: | Louise Macleod |
| Date | 23 February 2023 |

[12] A1679774.
[13] A1909583.
[14] A1909676.
[15] A1909723, A1909709.